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13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

15
16 United States of America,

17 Plaintiff,

18 vs.

19 Twitter, Inc.,

20 Defendant.

Case No. 3:22-cv-03070-TSH

**X CORP'S STATEMENT IN RESPONSE
TO THE UNITED STATES'
ADMINISTRATIVE MOTION TO
CONSIDER WHETHER ANOTHER
PARTY'S MATERIAL SHOULD BE
SEALED**

Pursuant to Civil Local Rules 7-11 and 79-5(c), X Corp., successor in interest to Defendant Twitter, Inc. (“X Corp.”), respectfully submits the following statement in response to the Administrative Motion to Consider Whether Another Party’s Material Should Be Sealed filed by the United States of America (“United States”). Dkt. No. 43. X Corp. requests that this Court seal certain portions of the United States’ Opposition to X Corp.’s Motion for Protective Order & Relief From Consent Order, Dkt. No. 41, as well as portions of exhibits to the Declaration of Scott P. Kennedy in Support of the United States’ Opposition to X Corp.’s Motion for Protective Order & Relief from Consent Order, Dkt. No. 42 (the “Kennedy Declaration.”). Specifically, X Corp. requests that portions of the following documents described in the accompanying Proposed Order (the “Confidential Material”) remain sealed:

- **Dkt. No. 41:** The United States’ Opposition to X Corp.’s Motion for Protective Order & Relief from Consent Order Filed Under Seal;
- **Dkt. No. 42-3** (Exhibit C to the Kennedy Declaration): Wilson Excerpts (Transcript of videoconference deposition of Seth Wilson, taken on behalf of the Federal Trade Commission dated May 5, 2023);
- **Dkt. No. 42-4** (Exhibit D to the Kennedy Declaration): Sayler Excerpts (Deposition of Andrew Sayler dated April 19, 2023);
- **Dkt. No. 42-5** (Exhibit E to the Kennedy Declaration): Kieran Excerpts (Deposition of Damien Kieran dated December 2, 2022);
- **Dkt. No. 42-6** (Exhibit F to the Kennedy Declaration): Kissner Excerpts (Deposition of Lea Kissner dated December 7, 2022);
- **Dkt. No. 42-7** (Exhibit G to the Kennedy Declaration): Kissner Exhibit 01 (Email from Lea Kissner’s personal email to Lea Kissner’s professional email dated November 10, 2022).

X Corp. seeks to keep the Confidential Material under seal because it contains non-public information that is sealable under federal law. Courts in the Ninth Circuit apply two standards in determining whether to permit documents to be filed under seal: (1) the “compelling reason” test for sealing information in connection with motions for a determination on the merits of a claim or

1 defense; and (2) the less-restrictive “good cause” test for sealing information in connection with
 2 non-dispositive motions. *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178–80 (9th
 3 Cir. 2006); *Ctr. for Auto Safety v. Chrysler Grp.*, 809 F.3d 1092, 1097 (9th Cir. 2016). The
 4 distinction between “dispositive” and “nondispositive” motions is not a “mechanical
 5 classification[,]” but focuses on whether the “motion at issue is more than tangentially related to the
 6 underlying cause of action.” *Ctr. For Auto Safety*, 809 F.3d at 1098–99. Confidential business
 7 information, trade secrets, and other information that if published may harm a party or third party’s
 8 competitive standing meet both standards. *See Ctr. for Auto Safety*, 809 F.3d at 1097; *see also Jam*
 9 *Cellars v. Wine Grp.*, No. 19-cv-01878-HSG, 2020 WL 5576346, at *2 (N.D. Cal. Sept. 17, 2020);
 10 *Fed. Trade Comm’n v. Qualcomm*, No. 17-cv-00220-LHK, 2019 WL 95922, at *3 (N.D. Cal. Jan.
 11 3, 2019); *In re Elec. Arts.*, 298 F. App’x 568, 569 (9th Cir. 2008).

12 Regardless of which applies, the Confidential Material clearly meets both the good cause
 13 and compelling reasons standards. The Confidential Material consists of deposition testimony from
 14 several former high-ranking privacy and information security personnel, and a resignation email
 15 from the company’s former Chief Information Security Officer, discussing sensitive information
 16 about X Corp. These materials disclose the details of X Corp. policies and structures, the contents
 17 of internal memoranda, and business and regulatory risk assessments, all of which are “sources of
 18 business information that might harm [X Corp.’s] competitive standing” if publicly disclosed. *Eco*
 19 *Elec. Sys. v. Reliaguard*, No. C 20-00444 WHA, 2022 WL 2239833, at *1 (N.D. Cal. June 22, 2022)
 20 (quoting *Nixon v. Warner Commc’ns.*, 435 U.S. 589, 598 (1978)); *see also Kamakana*, 447 F.3d at
 21 1179 (“‘compelling reasons’ sufficient to . . . justify sealing court records exist when such ‘court
 22 files might have become a vehicle for improper purposes,’ such as the use of records to . . . release
 23 trade secrets”). In particular, revealing the structure and makeup for X Corp.’s privacy and
 24 information security apparatus could assist potential hackers, cybercriminals, and other bad actors
 25 to devise schemes to penetrate X Corp.’s systems and cause harm to the platform.

26 Sealing the Confidential Material will protect X Corp.’s legitimate private interest in
 27 maintaining the confidentiality of its business information and guarding its competitive standing.
 28 Public disclosure of the Confidential Material could cause X Corp. competitive injury by permitting

competitors access to confidential information about X Corp.’s services, processes, and internal operations, while X Corp. lacks equivalent access to confidential information about those competitors. *See Skillz Platform v. Avia Games*, No. 21-cv-02436-BLF, 2023 WL 5767465, at *2 (N.D. Cal. Sept. 6, 2023) (granting a motion to seal documents “containing confidential business information the release of which would cause competitive harm”). No less restrictive alternative to sealing would adequately mitigate the risk of competitive harm from such public disclosure. Finally, X Corp.’s request is narrowly tailored to only the sealable portions of the Confidential Material.

For the foregoing reasons, X Corp. respectfully requests that the Court seal the highlighted portions of Exhibits C, D, E, F, and G to the United States’ Declaration, as well as the highlighted portions of the United States’ opposition motion, as detailed in the Proposed Order filed herewith.

DATED: September 18, 2023

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